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In the Supreme Court of the United States

OCTOBER TERM, 1969

LAWRENCE BRAICO and RONALD ROUTA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, Lawrence Braico and Ronald Routa, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on January 14, 1970.

OPINIONS BELOW

The judgment of conviction and sentence of the United States District Court for the Northern District of Illinois is not officially reported. The opinion of the United States

Court of Appeals for the Seventh Circuit entered on January 14, 1970, has not yet been officially reported. It is attached as an appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the district court was entered on January 14, 1970. A Petition for Rehearing En Banc was timely filed on January 27, 1970, and denied on February 19, 1970. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether it was error for the trial court to deny petitioners' motion for severance when it became apparent that there was a failure of proof of the conspiracy upon which joinder of defendants was predicated, and whether allowing the jury to consider evidence which was highly prejudicial and admissible only if a conspiracy was proven deprived petitioners of a fair trial on the substantive count.

2. Whether it was error for the trial court to deny petitioner Routa's request for a *voir dire* hearing on whether he had intelligently and voluntarily waived his Fifth and Sixth Amendment rights and to admit in evidence, over objection, his post-arrest statements to F.B.I. Agents.

3. Whether it was error to deny petitioners' pretrial motion to dismiss the conspiracy count of the indictment on the grounds that it did not properly charge a conspiracy and likewise to deny petitioners' motion for severance from co-defendant De Maio?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

RULES INVOLVED

Federal Rules of Criminal Procedure, Rule 8:

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Federal Rules of Criminal Procedure, Rule 14:

> RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT

Petitioners Braico and Routa were named in a four count indictment along with co-defendants Fred De Maio, also known as Frank Diamond, and co-defendant Richard Fernandez. Count one charged that all four defendants and unindicted co-conspirator Owen Garland conspired to violate 18 U.S.C. 2315 (receiving stolen property) in violation of the general conspiracy statute (18 U.S.C. 371) by conspiring with each other to receive the proceeds from a robbery of a jewelry store committed by co-defendant Fernandez and unindicted co-conspirator Garland. Count two charged co-defendant Fernandez alone with transporting the stolen jewelry in interstate commerce in violation of 18 U.S.C. 2314. Count three charged co-defendant De Maio alone with violation of 18 U.S.C. 2315 by receiving part of the jewelry stolen by Fernandez and Garland. Count four charged petitioners Braico and Routa alone with violating 18 U.S.C. 2315 by receiving part of the same shipment of jewelry stolen by Fernandez and Garland

(A. 8-11).* Co-defendant Fernandez entered a plea of guilty and, along with unindicted co-conspirator Garland, was a government witness.

Prior to trial, petitioners moved to dismiss count one on the ground that the alleged conspiracy was improperly charged and further moved for a severance from the defendant DeMaio and a separate trial on the substantive offense charged in count four (A. 11-12, R. 6). These motions were denied. Following the government's opening statement, petitioners again moved to dismiss the conspiracy count, which motion was denied.** At the close of the government's case, petitioners moved for judgment of acquittal on the charge of conspiracy, but this motion was denied, and the case was allowed to go to the jury, with the instruction that the jury was to disregard all limitations previously imposed upon the evidence and to consider all of the evidence against all of the defendants as to count one (the conspiracy count) (R. 87). The jury returned a verdict of guilty on all counts of the indictment, but judgment of conviction on the conspiracy count was reversed by the Court of Appeals on the grounds that no conspiracy had been proven.

The evidence adduced at the trial, largely through the testimony of the thieves Fernandez and Garland, showed that on August 2, 1967, Fernandez and Garland robbed a jewelry store in Bettendorf, Iowa and brought the jewelry to Chicago in search of a buyer or buyers. They first contacted the co-defendant DeMaio (whom they knew as "Frank Diamond") and on the evening of August 3, 1967,

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* As used herein, "A" designates the Appendix filed on behalf of co-defendant Fred DeMaio, in Case No. 17364, which was decided with the instant case by the Court of Appeals. "R" refers to the common law record and "Tr." designates the transcript of trial proceedings.

** (Tr. 17-19).

went to his home where he purchased approximately one third of the jewelry. He paid them $1,600 at that time and arranged to meet them the following day outside of Buddy's Lounge where he would pay him the remaining amount of $600, the agreed upon purchase price being $2200 for the jewelry purchased by DeMaio (A. 18-19). Fernandez and Garland then attempted to contact Braico, but were unsuccessful and left a message for him to meet them the following day in Buddy's Lounge (A. 19).

The following day Fernandez and Garland met co-defendant DeMaio outside of Buddy's Lounge and were paid the $600 he owed them. Then, as prearranged the previous evening, they entered Buddy's Lounge to wait for Braico. A short time later, Braico and Routa entered and Fernandez asked Braico if he could get rid of some jewelry. The four individuals then went to an apartment on Cicero Avenue and Addison in Chicago. After some time, Braico asked Fernandez and Garland why they had not told them they had sold part of the load to DeMaio and said they were having trouble getting rid of the remainder because DeMaio had "put the word out" that he could get the remainder of the jewelry for $3500. Braico then told Fernandez and Garland to leave the jewelry and meet him later in Buddy's Lounge (A. 20-21).

Later that evening, Braico and Routa met Fernandez and Garland in Buddy's Lounge and Braico paid Fernandez $4500 for the jewelry (A. 21).

During the trial, upon cross examination of the witness Fernandez by counsel for co-defendant DeMaio, the following occurred:

> Q. Can you tell us when you met Mr. Braico and Mr. Routa?
>
> A. Last year.

Q. When, last year, sir, approximately, if you know?

A. I met Mr. Braico in the early part of '67 in the Cook County Jail. (A. 24, Tr. 240-241).

Petitioners both moved for a mistrial and a severance. These motions being denied, they moved that the jury be instructed to disregard the answer, which motion was also denied (A. 24, Tr. 241-242).

Later, on redirect examination, the witness Fernandez was asked by the assistant United States Attorney, why he withheld from F.B.I. Agents the name of Frank Diamond when he was first interviewed and told the Agents that he had sold all of the jewelry to Braico. Over defense objection, he was allowed to answer:

"The reason I didn't mention Frank Diamond's name at the time was because I was afraid of the man. I thought he was associated with the syndicate." (A. 25, Tr. 259-260).

Petitioners' motions for a mistrial and that the jury be instructed to disregard the answer were denied (A. 25, Tr. 259-260).

As part of the government's case against Routa, the government sought to and did, over defense objection, introduce in evidence certain post-arrest statements made by Routa after he had been given certain warnings but had refused to sign a waiver of rights form (Tr. 704-748). Petitioner Routa's repeated requests for a *voir dire* hearing out of the presence of the jury to determine if there had been a knowing and intelligent waiver of petitioner's constitutional rights were denied (Tr. 706, 715, 720-21, 723). Following admission of the statements, petitioner Routa's motion that the court strike all testimony of the witness relative to the conversation was denied, as was likewise a motion for a mistrial (Tr. 747-748).

REASONS FOR GRANTING THE WRIT

1. Failure To Grant Petitioners' Motion For Severance When It Appeared That There Was A Failure Of Proof Of The Conspiracy Count Upon Which Joinder Of Defendants Was Predicated Violated Rule 14(b) Of The Federal Rules Of Criminal Procedure, And Allowing The Jury To Consider Evidence Which Was Highly Prejudicial And Admissible Only If The Conspiracy Charged Was Proven Deprived Petitioners Of A Fair Trial On The Substantive Count.

Petitioners Braico and Routa respectfully urge that this court consider and declare as reversible error failure of the trial court to grant petitioners' motion for severance and trial upon the substantive count separate from co-defendant DeMaio when it became apparent that the conspiracy charge upon which joinder of defendants was initially predicated was unproved. Failure to grant petitioners' request for relief from prejudicial joinder violated Rule 14(b) of the Rules of Federal Procedure. Moreover, allowing the jury which heard and considered the highly prejudicial evidence that Braico had been previously incarcerated in the Cook County jail and that co-defendant DeMaio was "thought" to be "associated with the syndicate" (which, *but for* the unproven charge of conspiracy upon which joinder of defendants was predicated, would not have been admitted in a separate trial), to deliberate and reach a verdict on the substantive charge, deprived petitioners of a fair trial upon the substantive count. *Bruton* v. *United States*, 391 U.S. 123 (1968). The significance of *Bruton* of course derives from the fact that the jury could not follow the court's instruction to limit consideration of the prejudicial evidence to the conspiracy

count but necessarily considered the same in reaching its verdict on the substantive count.

An issue similar to, but not identical with, the issue here raised was last decided by this Court in *Schaffer* v. *United States,* 362 U.S. 511 (1960), where this Court, with four justices dissenting, held that failure of proof of conspiracy under circumstances there presented did not require reversal on the substantive counts of which petitioners were convicted. Importantly, however, in *Schaffer:* (1) Petitioners did not move for severance until after failure of proof on the conspiracy charged; and (2) Most significantly, the District Court granted petitioners' motion for judgment of acquittal on the conspiracy count, whereas in the instant case the jury was allowed and indeed directed to consider the evidence on the conspiracy count, much of which would have been inadmissible but for the charge of conspiracy.

The crucial fact in the instant case therefore is whether the jury could and did ignore the highly prejudicial matter admissible on the conspiracy count alone in deciding petitioners' guilt on the substantive offense charged. In view of this Court's recent decision in *Bruton* v. *United States,* 391 U.S. 123 (1968), it is respectfully submitted that the jury could not and did not make such a distinction and petitioner respectfully requests this court grant certiorari to consider the application and meaning of *Bruton* to the facts as developed in the instant case — namely the effect upon the substantive conviction where the jury is allowed to hear and consider evidence highly prejudicial and admitted solely upon the basis upon an unproven conspiracy charge.

Initially, however, it should be pointed out that petitioners here, anticipating failure of proof of conspiracy, moved prior to trial to dismiss the conspiracy count and

for a trial separate from co-defendant DeMaio (A. 11-12). Assuming *arguendo* that at this time it was within the discretion of the trial court to deny petitioners' motion,* when it became apparent that no conspiracy had been proven, petitioners were entitled to severance because the offenses charged in the remaining substantive counts of the indictment were, absent proof of conspiracy, totally unconnected (See Rule 8(b) of the Federal Rules of Criminal Procedure).

The controlling rule and authorities are stated and cited in an opinion by Circuit Judge (now Chief Justice) Burger in *Ward* v. *United States*, 289 F. 2d 877 (D.C. Cir. 1961) where in a seven-count indictment one Ward was charged with a sale of narcotics in counts one, two and three. Counts four, five and six charged Ward and a co-defendant with separate sales of narcotics. A seventh count charged the co-defendant alone. In holding that the trial court erroneously denied Ward's pretrial motion for severance, the court observed that joinder of defendants on counts four, five and six was proper but that the indictment did not allege that count seven was in any way related to the offenses charged in counts four, five and six. In rejecting the argument that the lack of prejudice cured the error (the same argument relied upon by the Court of Appeals in the instant case), Judge Burger said:

> "The government contends that Lyon's acquittal on count 7 demonstrates that Ward did not suffer prejudice by joinder. But 'where multiple defendants are charged with offenses in no way connected, and are

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* Petitioners also contend that inasmuch as a conspiracy was not properly charged, in violation of Rule 8(b) of the Federal Rules of Criminal Procedure, the conspiracy count should have been dismissed and petitioners' pretrial motion for severance granted. (See Point three below).

> tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief.' *Ingram* v. *United States*, 4 Cir. 1959. See also Schaffer v. United States, 1960, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed. 921; McElroy v. United States, 1896, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355 . . . "
>
> *Ward* v. *United States*, 289 F.2d 877, 878.

A reading of *McElroy* and *Schaffer*, cited and relied upon by Judge Burger in *Ward*, directly support petitioners' contention that inasmuch as joinder in the instant case proved to be improper, their convictions on the substantive counts should accordingly be reversed.

In *McElroy* this Court reversed judgments of convictions where the trial court had consolidated four indictments against five defendants for trial. The Court, in language equally appropriate to the instant case, rejected the government's contention that the judgments

> " . . . should be affirmed because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each of some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion." *McElroy* v. *United States*, 164 U.S. 76, 81.

It is submitted that, as the Court of Appeals' opinion fails to show, but as is more specifically set forth and demonstrated below, Petitioners Braico and Routa were most certainly " . . . embarrassed and prejudiced in their defense" and that the "jury was distracted to their injury in passing upon distinct and independent transactions."

Schaffer v. *United States,* 362 U.S. 511 (1960), the other case cited and relied upon by Judge Burger in *Ward,* as already briefly pointed out above, is more nearly like the fact circumstances here present. Petitioners there were likewise charged with both conspiracy and substantive offenses, and, as here, there was no proof of conspiracy. Although the Court, with four justices dissenting, affirmed the judgments of conviction on the substantive offenses, two very important and it is submitted controlling factors distinguish this case from *Schaffer:*

1. In *Schaffer,* unlike the instant case, as the majority opinion took pains to point out, "The propriety of joinder prior to failure of proof of conspiracy was not assailed." (*Schaffer,* 362 U.S. 511, 515). The facts of the instant case are in sharp contrast. Braico and Routa attacked the sufficiency of the conspiracy charge and moved for trial separate from defendant DeMaio *prior to trial,* correctly anticipating that there would not and could not under the indictment be proof of conspiracy, and citing as ground the very same case (*United States* v. *Ford,* 324 F. 2d 950 (7th Cir. 1953) ultimately relied upon by the Court of Appeals in reversing judgment of conviction on the conspiracy count.* (A. 11-12, R. 6). At the close of

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* The other case relied upon by the Court of Appeals, *United States* v. *Varelli,* 407 F. 2d 735 (1969) was decided subsequent to trial in the instant case but likewise relied upon the court's prior decision in *Ford.*

the government's opening statement to the jury, petitioners again moved to dismiss the conspiracy count and again brought to the court's attention the case of *United States* v. *Ford*. Finally, at the close of the government's case, a similar motion was made and denied. As emphasized in *Schaffer*, as if speaking directly to the circumstances here present,

> "Nor can we fashion a hard-and-fast formula that when a conspiracy fails, joinder is error as a matter of law. We do emphasize, however, that, in such a situation, the trial judge has the continuing duty at all stages of the trial to grant a severance if prejudice does appear, and where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice."
>
> *Schaffer* v. *United States*, 362 U.S. 511, 516.*

The District Court was thus given every opportunity to correct or alleviate the unfortunate situation resulting from failure of proof of the conspiracy charge and petitioners here invoked every procedural remedy in an attempt to obtain the relief they are now forced to request from this Court.

2. Of far greater significance, and it is submitted totally dispositive of the issue here raised, is the fact that in

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* The opinion in *Schaffer* further states that petitioners " . . . not only failed to show any prejudice . . . but even failed to move for a new trial." (362 U.S. at 516) In the instant case oral motions for a new trial were made, and summarily denied, upon return of the verdict. (Transcript of Proceedings, November 15, 1968, at 2:00 p.m., p. 3). As defendants were, upon return of the verdict, immediately committed, without bail pending appeal, to the custody of the Attorney General of the United States by District Court Judge Julius J. Hoffman, all subsequent proceedings were in the Court of Appeals.

Schaffer, unlike the instant case, the *trial court* granted defendant's motion for judgment of acquittal on the charge of conspiracy and the case was submitted to the jury on the substantive charges only. The trial court, in submitting the remainder of the case,

> "meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were 'not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant.' "
>
> *Schaffer* v. *United States,* 362 U.S. 511, 515.

The circumstances of the instant case are again in sharp contrast. Rather than meticulously emphasizing to the jury that it must consider only the evidence on each charge as to each defendant, the trial court, after denying petitioners' motion for judgment of acquittal on the conspiracy count, and over objection of petitioners, instructed the jury to disregard the limitations previously imposed upon admission of the evidence and to consider all of the evidence against all of the defendants as to the charge in count one (the alleged conspiracy.)* (R. 87) Thus, the prejudice inherent in joint trials where there are no connecting circumstances justifying submission of the case to the jury was incalculably compounded in the instant case

*Although the instruction indicated that all of the evidence admitted should be considered only as to count one and not as to the substantive counts, the jury surely could not follow such a limiting instruction. *Bruton* v. *United States,* 391 U.S. 123 (1968). Failure of the jury to find defendants not guilty of conspiracy, in the face of a total absence of proof thereof, is evidence enough of the jury's demonstrated lack of ability to follow the instruction given by the court.

by the giving of an instruction at the close of the government's case that all of the evidence was henceforth to be considered against all of the defendants.*

In view of the foregoing distinguishing circumstances, can it be not honestly questioned whether, if the *Schaffer* court had been presented with the circumstances of this case, the Court would not have adopted the position taken by the four dissenting Justices, who relied principally upon *McElroy*, and reversed the judgments of conviction?

But there is more. In *Schaffer* the majority noted that petitioners had contended that prejudice was inherent in continuation of a joint trial after dismissal of the conspiracy count (a position entirely consistent with that of Judge Burger in *Ward*), but observed that ". . . not only was no prejudice shown, but the trial court and the Court of Appeals affirmatively found that none was present." (362 U.S. 511, 516)

Petitioners take issue with the conclusory and unsupported similar finding of the Circuit Court of Appeals in the instant case that petitioners were not prejudiced by a joint trial. Without discussion of the several grounds raised by petitioners in their brief, the Court of Appeals concluded that ". . . joinder of Mr. DeMaio with Mr.

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* This instruction, apparently peculiar to trials in the Seventh Circuit and particularly in the Northern District of Illinois, is commonly known as the "conspiracy instruction" or the "Allegretti instruction." Cf. *United States* v. *Allegretti*, 340 F.2d 243 (7th Cir. 1964). The instruction, originally held to amount to a directed verdict of guilty on the charge of conspiracy, *United States* v. *Pronger*, 287 F.2d 498 (7th Cir. 1961), was later upheld by the Seventh Circuit Court of Appeals in *Allegretti* and subsequent cases in which this Court has declined review.

Braico and Mr. Routa was not prejudicial to any of them, notwithstanding the want of evidence regarding a conspiracy." (App. p. 4)

That both petitioners were severely ". . . embarrassed and prejudiced in their defense" and that ". . . the attention of the jury was distracted to their injury" (*McElroy* v. *United States,* 164 U.S. 76, 81) is amply demonstrated by the record and was fully presented and argued to the Court of Appeals, which declined to set forth the relevant facts or explain the reasoning underlying its conclusion that petitioner suffered no prejudice.

Included in "all of the evidence" which the court specifically instructed the jury to consider in determining guilt or innocence on the unproven conspiracy charge were the following highly embarrassing and prejudicial circumstances, which, *but for* the charge of conspiracy would never have reached a jury charged only with determination of the substantive offenses charged against Braico and Routa.

1. *Evidence of Braico's Prior Jail Incarceration.* During cross examination of a government witness by counsel for co-defendant DeMaio, the witness was asked the following question and gave the following highly prejudicial answer:

> "Q. Can you tell us when you first met Mr. Braico and Mr. Routa?
>
> A. Last year.
>
> Q. When last year, sir, approximately, if you know?
>
> A. I met Mr. Braico in the early part of '67 in the Cook County Jail." (A., 24, Tr. 240-41)

Petitioners Braico and Routa immediately moved for a mistrial, a severance and for an instruction to the jury to disregard the answer. These motions were denied. (A., 24, Tr. 241-242)

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It is fundamental of course that evidence of prior offenses may not be shown by the prosecution to prove the offense charged and that such proof, as observed by this Court in *Boyd* v. *United States,* 142 U.S. 450 (1892):

> ". . . only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings . . ."
>
> *Boyd* v. *United States,* 142 U.S. 450, 458.

This reference to Braico's jail incarceration, by a witness who had been convicted of numerous offenses (A. 17) and who thus could have been expected to make most of his acquaintances in jail, was equally prejudicial to Routa who was intimately tied and associated with Braico by the evidence.

Of course this unfortunate occurence would not have resulted *but for* the charge of conspiracy resulting in joinder with co-defendant DeMaio and the consequent asking of the question by counsel for DeMaio which led to the prejudicial answer. This evidence of Braico's prior jail incarceration—inasmuch as petitioners' motion to strike was denied—was likewise part of "all of the evidence" upon which the court submitted the conspiracy charge to the jury.

2. *Testimony that a government witness thought co-defendant DeMaio was "associated with the syndicate."*

It was brought out on cross examination that co-defendant Fernandez, a government witness, had first told the F.B.I. that he had sold all of the jewelry to co-defendant Braico. (A., 22, Tr. 116-120) He later changed his story

and said that he had sold part of the jewelry to Braico and Routa and the remainder to co-defendant DeMaio. On redirect examination, the assistant United States Attorney asked why Fernandez did not refer to DeMaio on the first occasion of his being interviewed by F.B.I. Agent. Over defense objection, Fernandez answered:

> "The reason I didn't mention Frank Diamond's name at the time was because I was afraid of the man. I thought he was associated with the syndicate." (A. 25, Tr. 259)

It is important to note that the above testimony, if elicited by counsel for the government at a *separate* trial of Braico and Routa would not have nearly the same impact as it must necessarily have had in a joint trial in which Braico and Routa were likewise "associated with" DeMaio by means of the charge of conspiracy. If the jury was led to believe that DeMaio was associated with "the syndicate", would they not also be led to believe, by virtue of the allegation (and, in view of the verdict, in the minds of the jurors, the "fact") that Braico and Routa were associated with DeMaio in the conspiracy charged? In view of the fact that the trial court denied petitioners' motions for a mistrial and that the jury be instructed to disregard the obviously prejudicial answer (A. 25, Tr. 259-60), this evidence also became part of "all of the evidence" which the court instructed the jury to consider at the close of the government's case.

Petitioners submit that in view of the peculiar circumstances distinguishing this case from *Schaffer* v. *United States* the issue of when failure of proof of conspiracy will render the initial joinder prejudicial pursuant to Rule 14(b) of the Federal Rules of Criminal Procedure, especially where as here, unlike *Schaffer,* the jury is allowed to

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deliberate and reach a verdict of guilty on a conspiracy charge unsupported by the evidence, merits review by this Court. Indeed, quite apart from questions arising under Rule 14(b), petitioners contend that sufficient authority for reversal under the circumstances here present is found in *Bruton* v. *United States,* 391 U.S. 123 (1968) where this Court held that it was impossible for the jury to follow limiting instructions purporting to limit admission of a co-defendant's confession to the confessor. Similarly in the instant case, the court's instruction to limit consideration of all of the evidence to the conspiracy count called for an impossible task. This court should, therefore, assisted by *Bruton,* reexamine the rules applicable for joint trials where joinder of defendants is based solely upon the conspiracy charged and where highly prejudicial evidence is admitted and allowed to go to the jury, but the conspiracy charge upon which admission of such evidence is predicated not proven.

2. Failure To Grant Petitioner Routa's Request For A Voir Dire Hearing On The Admissibility Of His Post-Arrest Statements To F.B.I. Agents And Admission Of Such Statements Over Objection Was Reversible Error.

Petitioner Routa respectfully submits that this Petition should be granted and the judgment of the Court of Appeals reversed as to him because the District Court admitted in evidence, over objection, statements made by him following his arrest without according him a *voir dire* hearing as required by *Jackson* v. *Denno,* 378 U.S. 368 (1964). In denying petitioner's request for a *voir dire* hearing out of the presence of the jury, the District Court ignored and refused to follow not only the decision of this

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Court in *Jackson* v. *Denno* but the law of the Seventh Circuit Court of Appeals as well, which said, *United States* v. *Nielsen*, 392 F. 2d 849 (7th Cir. 1968):

> "To avoid the possibility of thus penalizing an accused for an exercise of his constitutional rights, we hold that whenever a defendant, by appropriate objection to proffered testimony concerning his statements made during custodial interrogation, contends that those statements were made in the absence of a knowing and intelligent waiver of his rights to remain silent and to consult with counsel, the court must excuse the jury and conduct a *voir dire* hearing to resolve this issue. (Cf. Jackson v. Denno, 378 U.S. 368)"
>
> *United States* v. *Nielsen*, 392 F. 2d 849, 852.

Although this issue was fully argued and presented to the Court of Appeals below, both in petitioners' principal brief and in their Petition for Rehearing En Banc*. the opinion of the court fails to set forth the facts upon which petitioner's contention is made or for that matter to even mention or allude to the issue. It is therefore necessary to quote at length here from the record.

Petitioner Routa was arrested on March 29, 1968, in his apartment, at which time he refused to sign a waiver of rights form, but admitted to FBI Agents that he knew alleged co-conspirator Fred DeMaio and made certain exculpatory statements. Over repeated objections and requests for a *voir dire* hearing, these conversations were admitted in evidence against him at the trial. F.B.I. Agent Robert Miller testified that on March 29, 1968, he ar-

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* Brief for Appellants Braico and Routa, pp. 24-27; Petition for Rehearing En Banc, p. 8.

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rested Routa in his apartment on North Cicero Avenue. Over repeated objections, the prosecutor asked the witness:

> "Now will you relate to the members of the jury what, if anything, was said by Mr. Routa and anyone else in the room and would you identify who was speaking?" (Tr. 705).

Defense counsel asked for a voir dire examination outside the presence of the jury, which request was overruled (Tr. 706).

Over objections, Agent Miller testified:

> "Agent Walters at that time advised Mr. Routa that he was being arrested in connection with a violation of Interstate Transportation of Stolen Property Statute; at that time Mr. Routa was furnished a waiver of rights from which was read to him.
>
> Mr. Echeles: I object, your honor, I ask again for a hearing outside the presence of the jury."

The motion was denied. (Tr. 715).

Mr. Routa was taken under arrest to the offices of the FBI where there was a conversation between the defendant and FBI agents.

> "Q. Will you relate that conversation, please, sir, and indicate what, if anything, was said by Mr. Routa, what, if anything, was said by yourself, what, if anything, was said by Mr. Meisler and what, if anything, was said by Mr. Walters.
>
> Mr. Echeles: I object, your Honor, unless we have a hearing outside the presence of the jury.
>
> The Court: I will let him answer over objection.

Mr. Echeles: I move for a voir dire hearing, your Honor, respectfully.

The Court: I deny the motion.

By the Witness:

A. At the outset of this interview I again furnished Mr. Routa with a waiver of rights form." (Tr. 715).

The last answer was stricken upon motion of defendant (Tr. 717).

"Q. Would you relate the conversation, Mr. Miller?

Mr. Echeles: I object.

The Court: I overrule the objection.

By the Witness: A. I advised Mr. Routa that he was arrested on a bench warrant issued in the Northern District of Illinois charging him with violation of interstate transportation of stolen property statute and this charge grew out of an armed robbery in Bettendorf, Iowa which occurred in August of 1967.

I also advised Mr. Routa that the government is contending that the jewelry taken in this robbery was transported from Bettendorf, Iowa to Chicago, Illinois.

Mr. Routa at that time advised me he knew nothing about any armed robbery or the transportation of any jewelry or the possession of any jewelry.

According to Mr. Routa—Mr. Routa also advised me that he had never seen any quantity of jewelry any place outside of a legitimate jewelry store.

Mr. Routa also informed me that the only quantity or purchase of jewelry he ever made was a watch and a ring for his wife.

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By Mr. Hartigan: Q. Now, sir, I show you what has been marked as Government's Exhibit No. 56 for identification.

Can you identify that document, sir?

A. Yes, sir.

Q. What is it?

A. I beg your pardon?

Q. What is it, please?

Mr. Echeles: I object to relating what a document is that I haven't seen and that is not admitted into evidence.

The Court: That isn't the rule. Any witness may identify a document. That does not mean that it is going to be admitted into evidence.

Mr. Echeles: I don't think any reference ought to be made to whatever document it is. I don't know what it is.

The Court: You are not entitled to see it until it is offered, sir.

Mr. Echeles: Well, then I object to his stating anything about it if it isn't offered, your Honor.

The Court: That objection will be overruled, sir. You may tell what it is.

The Witness: Thank you, your Honor.

The Court: If you know.

By The Witness: A. This is a form referred to as a waiver of rights form.

Mr. Echeles: I object to that answer and move it be stricken.

The Court: I will overrule the objection and deny the motion.

By Mr. Hartigan: Q. Does your signature appear on that document, sir?

A. It does, yes, sir.

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Q. Was that document shown to Mr. Routa?

A. Yes, it was.

Q. Do you recall whether or not it was shown to Mr. Routa prior or subsequent to your conversation in the Federal Bureau of Investigation office?

Mr. Echeles: Objection, your Honor, to the leading nature of the question.

Mr. Hartigan: He has got his choice.

Mr. Echeles: It is suggestive. The question should be when it was shown—

The Court: I will let him answer over objection.

You may answer, sir.

By the Witness:

A. The form was shown to him prior to the interview.

Mr. Hartigan: I now offer in evidence Government's Exhibit No. 56 for identification.

The Court: Show it to counsel.

Mr. Echeles: I object to whatever is on this piece of paper. I object to the piece of paper. It doesn't have Mr. Routa's signature on it, your Honor, and I object to it." (Tr. 716-719).

Over repeated objections of defense counsel and request for hearings outside the presence of a jury, which were denied (Tr. 720-721), Government's Exhibit 56 was received in evidence. (Tr. 722).

Defendant Routa's motion for mistrial was denied (Tr. 722).

Defense counsel moved for a voir dire hearing outside the presence of the jury on the authority of *United States* v. *Nielsen*, (7 Cir., 392 F.2d 849). The motion was denied (Tr. 723).

Over objections of defense counsel, Agent Miller read the contents of Exhibit 56 to the jury. The court also advised the document would go to the jury when the jury retired to deliberate (Tr. 723).

The witness also stated that he showed defendant Routa 17 photographs. Routa did not recognize or did not identify a picture of Owen Garland and Richard Fernandez. He did recognize pictures of Lawrence Braico, whom he had known since 1927, and who worked as a short order cook, and he did identify a photograph of Frank DeMaio, whom he knew as Frank Diamond (Tr. 726-727). He knew Diamond from his having frequented a restaurant around Harrison and Francisco Streets.

On cross-examination, the witness testified that he heard Routa say that he normally needed glasses and that Routa was belaboring the reading of Gov't Exhibit 56. No agent read the contents of the exhibit to Routa (Tr. 732-733). At the time when Routa looked at the photographs, he did not have his glasses on (Tr. 735).

On redirect-examination, the witness stated that a form similar to Government's Exhibit 56 was read to Routa in his apartment by his wife (Tr. 737).

Defense counsel moved to strike all of the testimony of the witness with respect to the document, or any matters that the witness related between him and Routa. The motion was denied, as was likewise a motion for mistrial (Tr. 747-748).

Failure to grant petitioners' request for a *voir dire* hearing is and was in direct violation of the decision of this Court in *Jackson* v. *Denno* (378 U.S. 368) and the decision of the Court of Appeals for the Seventh Circuit in *Nielsen* (392 F. 2d 849), decided prior to the trial of the instant case and cited to the District Court by petitioner in support of his request for a *voir dire* hearing. (Tr.

723) Moreover, subsequent to the trial of this case, the Seventh Circuit Court of Appeals reversed a judgment of conviction on the grounds that the District Court refused to hold a *voir dire* hearing on the voluntariness of defendant's exculpatory statements in *United States* v. *Johnson,* 409 F. 2d 861 (7th Cir. 1969). And in *United States* v. *Ried,* 410 F. 2d 12, 23 (7th Cir. 1969), the court while reversing on other grounds, observed that

> "... the Government concedes that under Jackson v. Denno, *supra,* 'the trial court could not have properly refused a request by the defendant for a hearing on the issue of whether a Fifth Amendment ground prevented the admission of his confession'."
> *United States* v. *Ried,* 410 F. 2d 1223, 1229.

There is no legally significant distinction whatsoever between the facts of the instant case, the facts of *Jackson* v. *Denno* and those of the decisions of the Seventh Circuit Court of Appeals in *Nielsen, Johnson and Ried.* (Perhaps most directly in point is *Johnson* where, as here, the statements purported to be exculpatory, but the Seventh Circuit nevertheless reversed.)

Failure of the Court of Appeals in the instant case to even recognize petitioner Routa's contention can only be attributed either to oversight* or to a reluctance to apply the law of *Jackson* v. *Denno* and of the Seventh Circuit as developed in *Nielsen, Johnson* and *Reid* to the facts of the instant case. It is therefore respectfully requested that this Court grant this petition and reverse the judgment of the Court of Appeals as to the petitioner Routa. Al-

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* While the court acknowledges that it considered the claims arising in connection with the alleged prejudicial error resulting from failure of proof of conspiracy, the court *nowhere* acknowledges or indicates that it considered Routa's separate Fifth Amendment claim.

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ternatively, Petitioner Routa requests that this Court vacate the judgment of the Court of Appeals and remand the case for consideration of this issue in view of the decision of this Court in *Jackson* v. *Denno* and in view of the Seventh Circuit's own decisions in *Nielsen, Johnson* and *Ried.*

3. As The Indictment Did Not Properly Charge A Conspiracy, Petitioners' Pretrial Motions To Dismiss The Conspiracy Count And For Severance Of Defendants Should Have Been Granted.

Petitioners Braico and Routa argued to the court below that inasmuch as the indictment did not properly charge a conspiracy, petitioners' pretrial motions to dismiss the conspiracy count and for a severance of defendants should have been granted. This argument was not considered by the Court of Appeals, which observed:

> "Because it is clear that no conspiracy was proved, we need not consider the alternative contention of the appellants that the indictment did not properly charge a conspiracy. (App. 3)

Petitioners respectfully contend that the Court of Appeals proceeded in inverse order in considering first whether a conspiracy had been proved (rather than charged), for, had it been determined as urged that the indictment did not properly charge a conspiracy, then it would have been unnecessary to determine whether a conspiracy was proved and the judgments of conviction should have been reversed on the grounds that it was error to deny petitioners' pretrial motion to dismiss the conspiracy count and grant petitioners a separate trial on the substantive count. By ignoring this issue, the Court of Appeals thus assumed that a conspiracy was properly charged—an assumption of no consequence if the court were considering *only* the conviction on the conspiracy count but an assumption vital

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to and underlying its affirmance of the judgments on the substantive count, for only if joinder was initially proper could the court possibly conclude that the absence of prejudice did not vitiate the convictions on the substantive counts. In short, by ignoring the issue here raised the court refused to decide whether petitioners Braico and Routa should have been tried with defendant DeMaio in the first place.

Petitioners respectfully submit that the indictment did not properly charge a conspiracy under the law of the Seventh Circuit and in support of their contention rely on *United States* v. *Varelli,* 407 F. 2d 735 (7th Cir. 1969), relied upon by the court below in reversing petitioners' convictions on count one on the grounds that there was no proof of conspiracy. The indictment herein merely charged in conclusory terms that petitioners Braico and Routa conspired with co-defendants DeMaio, Fernandez and Garland. Importantly, there was no allegation in the conspiracy count of ". . . any prior or contemporaneous understanding beyond the mere sales agreement . . ." (*United States* v. *Ford,* 324 F. 2d 950, 952). As observed by the Seventh Circuit Court of Appeals in *Varelli,* where the Court relied directly upon *Ford,*

> "There was no evidence of any further agreement, and therefore they *cannot be charged* with conspiracy." *United States* v. *Varelli,* 407 F. 2d 735, 748 (Emphasis supplied).

Similarly, as there was no evidence of any further agreement in the instant case, not only does it follow that petitioners Braico and Routa could not be convicted of conspiracy but they could not, absent an allegation in the indictment of a prior or contemporaneous understanding beyond the mere sales agreement, be *charged* with conspiracy. Accordingly, it was error for the trial court to

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deny petitioners' motion, based upon *Ford* and which correctly anticipated that proof of the conspiracy count would fail, to dismiss count one of the indictment and for severance from the defendant DeMaio. (A. 11-12, R. 6)

By refusing to decide this issue—whether a conspiracy was properly charged in the first place—the Court of Appeals has denied to petitioners the opportunity for relief based upon denial of their pretrial motions. Accordingly, for the reasons urged herein, petitioners respectfully request that this court grant the petition and reverse the judgment of the Court of Appeals. Alternatively, it is respectfully requested that this Court vacate the judgment of the Court of Appeals and remand this case with directions to consider and decide the issue of whether petitioners were properly charged with conspiracy and whether denial of petitioners' pretrial motion to dismiss the conspiracy count and grant them a trial separate from co-defendant DeMaio was error.

CONCLUSION

For the reasons urged herein, it is respectfully requested that Petitioners' requests, and each of them, for a writ of certiorari be granted.

Alternatively, for the reasons urged in points two and three, if this Court does not see fit to grant this petition, it is respectfully requested that the judgment of the Court of Appeals be vacated and the cause remanded with directions to consider the issues raised in points two and three herein.

Respectfully submitted,

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Attorney for Petitioners

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In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 SEPTEMBER SESSION, 1969

Nos. 17298, 17364

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAWRENCE BRAICO and RONALD ROUTA,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRED DEMAIO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 14, 1970

Before KNOCH, *Senior Circuit Judge,* KERNER, *Circuit Judge,* and GORDON, *District Judge.*

GORDON, *District Judge.*[1] This is an appeal from convictions entered against the three appellants. The charges stem from the sale in Chicago of goods stolen in Iowa.

[1] The writer of this opinion is sitting by designation from the district court for the Eastern District of Wisconsin.

Two of the appellants, Mr. Braico and Mr. Routa, were convicted of violating 18 U.S.C. § 2315 by receiving stolen property; the third appellant, Mr. DeMaio, was convicted of the same crime, but he was charged in a separate count of the indictment. In addition, all of the appellants, together with Mr. Fernandez, a seller of the stolen property, were convicted of violating 18 U.S.C. §371, by conspiring to violate §2315.

The appellants contend that the conspiracy was not properly charged or proved. While it is not denied that Mr. Braico and Mr. Routa were properly joined as defendants, it is urged that the joinder of those two with Mr. DeMaio was error. The appellants contend that this alleged misjoinder prejudiced each of them.

I. THE CONSPIRACY COUNT

The evidence showed that on August 2, 1967, two men, Mr. Fernandez and Mr. Garland, robbed a jewelry store in Bettendorf, Iowa. Afterward, they went to Chicago where they sought a buyer for the stolen goods. Mr. DeMaio bought approximately one-third of the goods for $2200; he offered to pay $3500 for the rest, but this offer was declined.

They then contacted the defendants, Mr. Braico and Mr. Routa, and offered to sell them the remaining goods for $4500. After Mr. Braico and Mr. Routa had made inquiries among acquaintances to whom they might resell the goods, they advised Mr. Fernandez and Mr. Garland that it would be difficult to resell the goods if they paid $4500 because "Johnny Diamond" (who was identified at the trial as Mr. DeMaio) had "put out the word" that he could get the remaining goods for $3500. However, after further bargaining, they purchased the goods for $4500.

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No evidence was adduced at the trial as to any agreement existing at any time among all three of the appellants. No evidence was adduced that any of the three had had any understanding with Mr. Fernandez or with Mr. Garland prior to or contemporaneous with the robbery. These were unrelated purchases of the stolen goods by the appellants, and such transactions do not reflect a conspiracy in the absence of proof of an agreement as to this transaction or as to some other concert of action. *United States* v. *Ford,* 324 F.2d 950, 952 (7th Cir. 1963).

In *United States* v. *Varelli,* 407 F.2d 735, 748 (7th Cir. 1969), Judge Kerner, writing for this court, observed that certain named defendants

> ". . . were all involved with the *distribution* of merchandise stolen in interstate commerce. None of these parties were involved with the *theft* of either the Polaroid equipment or the silver shipments. The relation of buyer and seller even with knowledge of the character of the goods being sold is insufficient to make the buyer a conspirator."

Because it is clear that no conspiracy was proved, we need not consider the alternative contention of the appellants that the indictment did not properly charge a conspiracy.

The government does not seriously challenge the appellants' contention that there was inadequate proof to support the conspiracy conviction. However, the government urges that the absence of proof as to a conspiracy does not require reversal of the convictions upon the substantive counts of the indictment.

II. THE SUBSTANTIVE COUNTS

The appellants point to a number of rulings made by the trial court in connection with the receipt of evidence,

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which, it is claimed, constituted prejudicial error because of the total absence of proof to support the conspiracy count. We have carefully examine each of these specific instances and conclude that the joinder of Mr. DeMaio with Mr. Braico and Mr. Routa was not prejudicial to any of them, notwithstanding the want of evidence regarding a conspiracy.

In *Varelli,* cited above, this court observed, at p. 748, that even when a conspiracy had not been proved, it is possible to affirm convictions on the substantive counts "where the evidence is overwhelming". Our examination of the present record persuades us that the evidence as to each defendant's guilt was unusually clear; we believe that the jury was not confused by the existence of the conspiracy count or by the presentation of the proof in a joint trial. See *Kotteakos* v. *United States,* 328 U.S. 750, 765 (1946) and *United States* v. *Levi,* 177 F.2d 827 (7th Cir. 1949), mod. 177 F.2d 833 (7th Cir. 1949). Cf. *United Ctates* v. *Reed,* 376 F.2d 226 7th Cir. 1967).

III. THE GRAND JURY PROCEEDINGS

The appellants ask the court to reverse the convictions on the ground that only hearsay evidence was considered by the grand jury. Appellants draw this conclusion from the fact that each of the government witnesses who testified at the trial responded negatively when asked whether he had appeared before the grand jury which returned this indictment.

The appellants charge that only hearsay evidence was offered to the grand jury in order that the prosecution could avoid its obligations under *United States* v. *Amabile,* 395 F.2d 47 (7th Cir. 1968); in that ruling this court noted that a defendant is entitled to examine the grand jury testimony of a witness at the trial in order to attempt

to impeach such witness. See *United States* v. *Borelli*, 336 F.2d 376, 391 (2d Cir. 1964).

In our opinion, the record does not establish the accuracy of the appellant's charge that only hearsay evidence was presented to the grand jury. However, even if that contention were correct, we note that the appellants do not suggest that there was an absence of probable cause before the grand jury. The law permits probable cause to be based on hearsay evidence. *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *United States* v. *Sternback*, 402 F.2d 353, 356-7 (7th Cir. 1968).

We are mindful of the judicial expressions emanating from the second circuit which are critical of the practice of presenting only hearsay evidence before a grand jury when better evidence is available. See, for example, *United States* v. *Arcuri*, 405 F.2d 691 (2d Cir. 1968). The prosecutor in the appeal before this court has asserted that, as a matter of policy, primary evidence is not withheld from the grand jury. In our opinion, the record does not establish that an abuse occurred in the case at bar.

IV. CONCLUSION

In view of the absence of proof establishing the existence of a conspiracy, the conviction of count I of the indictment is reversed as to all appellants. The conviction of the defendant, Fred DeMaio, on the substantive count numbered III of the indictment is affirmed, and the conviction of the defendants, Lawrence Braico and Ronald Routa, on the substantive numbered count IV of the indictment is affirmed.

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Clerk of the United States Court of Appeals for the Seventh Circuit.